



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for January 6, 2023

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BOARD DECISIONS

Appellant: Tammika S. Richardson

Agency: Department of Veterans Affairs

Decision Number: [2023 MSPB 1](#)

Docket Number: AT-0714-21-0109-I-1

Issuance Date: January 4, 2023

Appeal Type: Removal, Demotion, or Suspension by DVA

Action Type: Removal

INTERLOCUTORY APPEAL

VA ACCOUNTABILITY ACT

The agency removed the appellant, a hybrid employee appointed under 38 U.S.C. § 7401(3) subject to both Title 38 and Title 5, for misconduct pursuant to 38 U.S.C. § 714. On appeal, the administrative judge issued an Order Certifying Interlocutory Appeal for his ruling that the agency cannot rely on 38 U.S.C. § 714 to remove a hybrid employee appointed under 38 U.S.C. § 7401(3).

Holding: The administrative judge properly certified his ruling as an interlocutory appeal to the Board pursuant to 5 C.F.R. § 1201.92.

1. Under 5 C.F.R. § 1201.91, an interlocutory appeal is an appeal to the Board of a ruling made by an administrative judge during a proceeding. The administrative judge properly certified his ruling for interlocutory appeal under 5 C.F.R. § 1201.92 because whether the agency has authority under 38 U.S.C. § 714 to remove a hybrid employee is an important question of law about which there is substantial ground for difference of opinion and an immediate ruling will materially advance the completion of this proceeding.

Holding: The agency cannot rely on 38 U.S.C. § 714 to remove a hybrid employee appointed pursuant to 38 U.S.C. § 7401(3).

1. As a hybrid employee appointed under 38 U.S.C. § 7401(3), the appellant is covered by 38 U.S.C. § 7403(f)(3), under which “all matters relating to adverse actions . . . shall be resolved under the provisions of title 5 as though such individuals had been appointed under that title.”
2. Both the Federal Circuit in *Kelley v. Merit Systems Protection Board*, 379 F. App’x 983, 984 (Fed. Cir. 2010), and the Board in *Graves v. Department of Veterans Affairs*, 114 M.S.P.R. 209, ¶¶ 9, 12-15 (2010), acknowledged that in cases arising after 2003 but prior to the enactment of the VA Accountability Act, 38 U.S.C. § 7403(f)(3) applied to hybrid employees appointed under 38 U.S.C. § 7401(3).
3. 38 U.S.C. § 714(a)(1) allows for the removal, demotion, or suspension of a “covered individual,” which 38 U.S.C. § 714(h)(1) defines as “an individual occupying a position at the [agency],” with exceptions that do not include individuals appointed under 38 U.S.C. § 7401(3). However, 38 U.S.C. § 714 does not expressly repeal 38 U.S.C. § 7403(f)(3). Congress also did not repeal 38 U.S.C. § 7403(f)(3) by implication because 38 U.S.C. § 714 and 38 U.S.C. § 7403(f)(3) are reconcilable and capable of coexistence. Further, because the scope of 38 U.S.C. § 7403(f)(3) is narrower than that of 38 U.S.C. § 714, 38 U.S.C. § 7403(f)(3) takes precedence under the precept that a more specific statute takes precedence over a more general statute. Legislative history also does not show an intent to repeal 38 U.S.C. § 7403(f)(3) or disavow the application of 5 U.S.C. chapter 75 procedures to

hybrid employees.

4. Converting the appeal from a 38 U.S.C. § 714 action to a 5 U.S.C. chapter 75 appeal at this stage is inappropriate due to due process concerns. If the agency wishes to take an adverse action against the appellant it must do so under 5 U.S.C. chapter 75 procedures.
5. The Board affirmed the administrative judge's ruling on interlocutory appeal, vacated the administrative judge's order staying the proceedings, and returned the appeal to the administrative judge for further adjudication consistent with the opinion and order.

COURT DECISIONS

NONPRECEDENTIAL:

Campbell v. Christine Wormuth, Secretary of the Army, No. [19-2395](#) (4th Cir. Dec. 27, 2022) (MSPB Docket No. DC-0752-17-0326-I-1). The Court affirmed the district court's award of summary judgment on the appellant's Title VII, ADEA, and WPA claims. On the appellant's WPA claims, the Court found that the Board's conclusions that: (1) the appellant did not reasonably believe he was reporting a violation of law regarding the disposition of his laptop, and (2) the appellant's vague complaints about management were not sufficient for a disinterested observer to reasonably conclude that he disclosed violations of law or gross management, were not arbitrary or capricious and were supported by the record.

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